Supreme Court, U.S.
FILED
SEP 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1699 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel

EDWARD J. O'MEARA
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

BEST AVAILABLE COPY

17pp

QUESTIONS PRESENTED

Whether the Interstate Commerce Commission properly set aside the maximum reasonable intrastate rail rate prescribed by a state regulatory commission on the ground that the state commission had failed to comply with the "standards and procedures" of the Interstate Commerce Act.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 7

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *NRDC,* No. 82-1005 (June 25, 1984) 12

Houston Lighting & Power Co. v. *United States,* 606 F.2d 1131, cert. denied, 444 U.S. 1073 6

Illinois Central Gulf R.R. v. *ICC,* 702 F.2d 111 10

Kentucky Utilities Co. v. *ICC,* 721 F.2d 537 ..... 10, 11

Udall v. *Tallman,* 380 U.S. 1 12

Utah Power & Light Co. v. *ICC,* 747 F.2d 721, on rehearing, 764 F.2d 865 ..... 6, 10

Wheeling-Pittsburgh Steel Corp. v. *ICC,* 723 F.2d 346 10

Page

Statute:

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 49 U.S.C. 10101 *et seq.* :

49 U.S.C. 10101a note 2

49 U.S.C. 10101a(3) 2

49 U.S.C. 10101a(9) 2

49 U.S.C. 10709(d)(2) 4

49 U.S.C. 11501 (§ 214, 94 Stat. 1913) 2, 3

49 U.S.C. 11501(b)(1) 3

49 U.S.C. 11501(b)(2) 3

49 U.S.C. 11501(b)(3) 3

49 U.S.C. 11501(b)(3)(A) 3

49 U.S.C. 11501(b)(6) 3

49 U.S.C. 11501(c) 3, 11

Miscellaneous:

H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. (1980) 2

H.R. Rep. 96-1035, 96th Cong., 2d Sess. (1980) 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1699

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 749 F.2d 753. The decision of the Interstate Commerce Commission issued in response to petitioner's motion to reopen the proceedings before the Commission (Pet. App. 41a-73a) is reported at 367 I.C.C. 639. The initial decision of the Interstate Commerce Commission (Pet. App. 74a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1984. A petition for rehearing was denied on January 29, 1985 (Pet. App. 39a-40a). The petition for a writ of certiorari was filed on April 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Staggers Rail Act of 1980 (the Staggers Act) effected a comprehensive change in railroad regulation in order "to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States." 49 U.S.C. 10101a note. Recognizing that the railroad industry's earnings were "the lowest of any transportation mode" and were "insufficient to generate funds for necessary capital improvements" (*ibid.*), Congress sought to improve the industry's financial health by reducing outmoded regulation. See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 79-80 (1980). A major goal of the Staggers Act was to "allow[] rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission." 49 U.S.C. 10101a(3).

The Staggers Act expressly requires the ICC "to assure that *intrastate* regulatory jurisdiction is exercised in accordance with the [federal] standards." 49 U.S.C. 10101a(9) (emphasis added). The framers of the Act had specifically observed that burdensome state regulatory policies were a major cause of the industry's financial difficulties. See H.R. Rep. 96-1035, 96th Cong., 2d Sess. 61, 128-130 (1980).[1] To eliminate that burden, Congress enacted Section 214 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1913 (amending 49 U.S.C. 11501) "to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals." H.R. Conf. Rep. 96-1430, *supra,* at 106. Section 214 fundamentally

---

[1]For example, the House Report noted a great disparity in the revenue-to-variable cost ratios between federally regulated interstate traffic and state regulated intrastate traffic. The Report suggested that this disparity, in 1977 alone, reflected a $400 million reduction in railroad revenues attributable to state regulation. H.R. Rep. 96-1035, *supra,* at 61.

altered the federal-state relationship in interstate rail regulation by increasing the ICC's role in intrastate rail matters while reducing the jurisdiction of the states. Specifically, Section 214 eliminated all state jurisdiction over general rate increases, inflation-based rate increases, and fuel adjustment surcharges approved by the ICC. 49 U.S.C. 11501(b)(6). As to other aspects of railroad rate regulation, Section 214 prohibits the states from applying their own diverse regulatory standards and, instead, requires that any state regulating intrastate rail transportation must do so exclusively in accordance with the provisions governing ICC regulated railroads. 49 U.S.C. 11501(b)(1).

To ensure that states comply with the federal regulatory scheme, Section 214 also requires that all states wishing to regulate intrastate rail transportation first obtain certification from the ICC. To obtain certification, the state authorities must submit their "standards and procedures" for intrastate rail regulation for review by the ICC. 49 U.S.C. 11501(b)(2) and (3). The ICC will certify the state authority only if the Commission determines that the state's "standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the [ICC under Title 49 of the United States Code]." 49 U.S.C. 11501(b)(3)(A). Even if a state has received certification, however, a railroad aggrieved by state regulation may seek relief from the ICC on the ground that the standards and procedures applied by the state were not in accordance with their federal counterparts. 49 U.S.C. 11501(c). Section 11501(c) also provides for an expedited decision by requiring the ICC to evaluate the state's decision and, if necessary, to authorize an "appropriate" rate within 30 days of the Commission's receipt of the petition.

2. In March 1981, petitioner, joined by the Peabody Coal Company (Peabody), filed a complaint with the Public Service Commission of Indiana (Indiana PSC), alleging

that Louisville and Nashville Railroad Company (L&N) was charging an unreasonable rate ($0.94/ton) on its intrastate shipment of coal from a Peabody mine to petitioner's electric generating plant.[2] Relying upon the complainants' cost data and accepting complainants' allegation that L&N was inefficiently run, the Indiana PSC held that the challenged rate was unreasonably high and that the " 'just and reasonable rate' " was $0.558/ton, which was equal to the full *cost* of L&N's service. Pet. App. 5a-6a. The Indiana PSC acknowledged that, because the L&N was a "revenue inadequate" railroad,[3] the L&N was entitled to set rates at levels in excess of its costs, but the Indiana PSC held that the L&N could do so only if its management was shown to be " 'honest, efficient, and economical' " (Pet. App. 5a (footnote omitted); *id.* at 20a). After finding that L&N was " 'inefficient,' " primarily by comparing L&N's performance to that of an acknowledged industry leader (Pet. App. 5a-6a), the Indiana PSC prescribed a rate of $0.65/ton, the lowest possible rate that could be set under the Staggers Act (see 49 U.S.C. 10709(d)(2)).

3. On a petition for review filed by the L&N, the Commission set aside the rate prescribed by the Indiana PSC on the ground that the Indiana PSC had failed to comply with the governing federal statutory standards (Pet. App.

---

[2]L&N had charged $0.69/ton for that traffic since June 1979, and the Indiana PSC had approved that rate, subject to certain applicable increases, in a prior proceeding. Thereafter, L&N lawfully applied several general and selective increases to bring its rate up to $0.94/ton as of October 1, 1981. In the state decision at issue in this case, the Indiana PSC found that the maximum reasonable rate was $0.65/ton as of October 1, 1981, which was $0.04/ton *lower* than the Indiana PSC had found was reasonable more than two years beforehand. Pet. App. 4a, 58a n.16.

[3]The ICC had already determined that L&N was a revenue inadequate railroad. See Pet. App. 42a n.3.

41a-73a).[4] Specifically, the ICC found that the Indiana PSC had committed a clear error of law in failing to balance the revenue adequacy and efficiency goals of the Staggers Act and by giving absolute priority to considerations of management efficiency (Pet. App. 46a, 55a-59a).[5] The Commission further held that the Indiana PSC had not complied with federal standards in finding that L&N was being run inefficiently and that the evidence also did not support the Indiana PSC's finding (Pet. App. 46a, 59a-67a). Finally, the ICC held that reducing the L&N's intrastate rate to the minimum rate permitted by the Staggers Act was arbitrary because the Indiana PSC had failed to demonstrate a reasonable relationship between the alleged wrong (the L&N's inefficiency) and its chosen remedy (the rate reduction) (Pet. App. 53a, 67a). The ICC also found that L&N's existing rate was appropriate and authorized the L&N to continue charging that rate (Pet. App. 67a-68a). The Commission emphasized that absent a showing of unreasonableness

---

[4]The Commission issued two decisions in this case, both of which came to the same conclusion (Pet. App. 41a-73a, 74a-87a). After the Commission rendered its initial decision in November 1982, petitioner moved to reopen the proceedings before the Commission, and the Commission did so in March 1983. In its second decision, issued in June 1983, the Commission explained that it had reopened the proceedings because it found that its prior decision had "inadequately articulated" the reasons for the Commission's conclusion (Pet. App. 45a). The court of appeals, over petitioner's objection, focused on the Commission's second decision (Pet. App. 8a-11a). Petitioner has not objected to the court of appeals' approach in its petition.

[5]The ICC specifically focused on, and rejected, the state's Finding No. 55, which constituted the analytical framework within which the state determined the reasonableness of L&N's rate. In Indiana Finding No. 55, the state held: " 'Although the burden of proving that the assailed rate is unreasonable is upon [complainant], once it has come forward with evidence showing that the management of L&N is not 'honest, economical and efficient' the burden of rebutting such allegation *in order to demonstrate entitlement* to differential pricing above the Staggers mandate of [the jurisdictional threshold] shifts to the L&N.' " Pet. App. 22a-23a (emphasis added).

(found not to have been made here), the carrier-initiated rate must stand and noted that L&N's rate was well below other intrastate and interstate unit train coal rates in the area (Pet. App. 68a).[6]

4. The court of appeals affirmed (Pet. App. 1a-34a). After comprehensively examining the federal regulatory scheme and scrutinizing the record in this case (Pet. App. 11a-18a), the court concluded that "each of the ICC's reasons for reversing the Indiana Commission is entirely sound" (Pet. App. 20a).[7] The court ruled that the Indiana PSC had erred in denying the L&N the right to use differential pricing[8] above the statutory minimum until the L&N had demonstrated that it was being operated efficiently, because that analysis failed to balance both revenue and efficiency concerns (Pet. App. 20a-22a). The Indiana PSC had also erroneously required the L&N to show that it was efficient, since the Staggers Act requires a complainant to prove that a carrier's rate is unreasonable (Pet. App. 22a-23a).[9] Moreover, the court held that Indiana PSC had gone

---

[6]Based on its analysis of the evidence, the ICC also held that L&N's rate was comparable to others that the Commission had found reasonable in the recent past (Pet. App. 68a, 80a-81a).

[7]Relying upon its prior decision in *Utah Power & Light Co.* v. *ICC*, 747 F.2d 721, 732-734 (D.C. Cir. 1984), the court of appeals also held that the ICC's authority to review the decision of a state regulatory commission was plenary and, in a proper case, "allow[s] the ICC to delve into the factual record before the state agency" (Pet. App. 12a-13a).

[8]Under differential (or demand-based) pricing, a railroad may charge shippers in competitive markets a rate returning less profit than a rate charged to shippers in captive markets. The Commission and the courts have often upheld the use of such a pricing policy. See, *e.g.*, *Huston Lighting & Power Co.* v. *United States*, 606 F.2d 1131, 1148 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980).

[9]Here, the Indiana PSC in effect held that the complainants had established a prima facie case of inefficiency simply by alleging that L&N was not as efficient as one other railroad, Southern Railway System, a carrier acknowledged to be one of the nation's most efficient railroads. See Pet. App. 5a, 18a, 22a-23a, 26a-28a, 59a-60a.

astray by " 'mechanical[ly]' " imposing the minimum statutory rate unless a railroad is found to be efficient, because this approach was "contrary to the rate flexibility required by" the statute (Pet. App. 24a). In addition, the Indiana PSC's approach—limiting a railroad found to be " 'inefficient' " to the statutory minimum rate—was arbitrary, the court of appeals explained, because it could result in reducing a carrier's revenues by an amount unrelated to the extent of the alleged inefficiency (Pet. App. 24a-25a). Fifth, the court agreed with the Commission that the evidence was insufficient to prove that the L&N was inefficient (Pet. App. 25a-30a).

Finally, the court found that the ICC had adequately supported its finding that the appropriate rate was L&N's existing charge of $0.94/ton. Noting that petitioners had not identified any specific deficiencies in the ICC's cost findings or its analysis of revenue-to-cost ratios, the court held that the Commission's decision was consistent with the Interstate Commerce Act, adequately reasoned, and supported by substantial evidence (Pet. App. 31a-34a).

ARGUMENT

The thorough opinion of the court of appeals, upon which we rely, correctly affirmed the Commission's interpretation of its responsibilities under the Staggers Act and the ICC's application of the Act to the facts of this case. Moreover, the court of appeals' decision, which turns largely on the peculiar facts of this case, does not conflict with any decision of this Court or of any other court of appeals. Indeed, petitioners acknowledge that "this is a case of first impression" (Pet. 17; *id.* at 5). Accordingly, review by this Court is not warranted.

The court of appeals held that the Indiana PSC's "central error of law" was its ruling that L&N was not entitled to set its rates above the statutory minimum until the L&N had

first proved that it was being operated efficiently (Pet. App. 20a-21a). This ruling, as both the court of appeals and the ICC correctly recognized, underlies the state's entire decision (Pet. App. 22a, 46a). Petitioner does not defend the Indiana PSC's ruling in this respect. In addition, the Indiana PSC's finding that the L&N was inefficient was the cornerstone of its ruling that L&N's existing rate was unreasonable (Pet. App. 25a-30a, 46a). Petitioner does not challenge the concurrent determinations by the ICC and the court of appeals that the evidence was legally insufficient to show that the L&N in fact was inefficient. Given those rulings, either of which requires that the state's decision be set aside, further review of petitioner's fact-bound claims is not warranted.

In any event, petitioner's claims lack merit. Petitioner maintains (Pet. 9-12) that the court of appeals gave insufficient weight to the so-called " 'cost-based approach' " of the Indiana PSC; alternatively, petitioner contends (Pet. 13-14) that the court of appeals gave "undue weight" to considerations of revenue adequacy. Both arguments, however, mischaracterize the court of appeals' ruling, which expressly recognized that "[r]evenue adequacy is not, of course, the only consideration in Staggers Act ratemaking" (Pet. App. 15a). Moreover, petitioner ignores the rationale given by the court of appeals and the Commission.

The court of appeals and the ICC both held that the Indiana PSC went astray by "exalt[ing]" one statutory factor (carrier efficiency) "at the expense of others that are at least co-equal in importance" (Pet. App. 21a), thereby deviating from the balancing approach to ratemaking mandated by the statute. Petitioner argues (Pet. 11) that the state fully complied with the standards of the Interstate Commerce Act when it found what it considered to be

L&N's fully-allocated costs for the service and then prescribed a small increment above that level "after consideration of non-cost factors." But the Commission's and the court of appeals' criticism of the state's approach was not that the state *began* its inquiry by considering L&N's costs, but that it effectively *ended* its analysis there. Costs have always been, and will continue to be, a factor in rate reasonableness determinations. The ICC and the court of appeals did not rule to the contrary; rather, they simply held that the Staggers Act requires a state regulatory commission to balance all of the statutory factors, rather than to rely upon one factor in isolation. Indeed, petitioner concedes that the Staggers Act requires a state commission to consider both a carrier's revenue adequacy and its efficiency "under a balanced approach" (Pet. 8). Petitioner's claim thus is simply that the Commission and the court of appeals failed properly to balance the factors in this case. That fact-bound claim does not warrant further review.[10]

Petitioner also argues (Pet. 9, 11) that the Commission lacks authority to set aside the decision of a state regulatory commission so long as the state commission has trudged through the statutory factors. However, as the facts of this case make clear, petitioner's construction of the Staggers Act is inconsistent with one of its fundamental purposes: to protect carriers from arbitrary ratemaking decisions by state regulatory commissions. See pages 2-3, *supra*. As the court of appeals explained, unless the Commission can

---

[10]The Indiana PSC held that the " 'just and proper rate' " for the L&N should " 'not exceed the fully allocated cost of [L&N's] service' " (Pet. App. 57a n.15), but claimed that, by raising the L&N's rate to the statutory minimum, it had given effect to the statute's revenue adequacy goal (Pet. App. 56a). The Commission correctly observed that this reasoning was "nothing more than a superficial bow to the Staggers Act" (Pet. App. 57a), since the Indiana PSC could not have prescribed a rate below the statutory floor.

"penetrate below the surface of the state opinion to the substance" (Pet. App. 18a), a state commission could merely pay "[l]ip-service" to the proper federal standards "while improperly finding the facts, misapplying law to facts, or giving inordinate weight to isolated concerns" (*ibid.*). Indeed, the contrary rule would allow states to shield the very practices that led Congress to enact the preemption provisions of the Staggers Act in the first place. See *Utah Power & Light Co.* v. *ICC*, 747 F.2d 721, 731-735 (1984), supplemented on rehearing, 764 F.2d 865 (D.C. Cir. 1985); *Wheeling-Pittsburgh Steel Corp.* v. *ICC*, 723 F.2d 346, 354-355 (3d Cir. 1983).

Petitioner asserts (Pet. 11) that the ICC has pursued an ad hoc approach to review of state commissions' ratemaking decisions and argues that this approach is unlawful because the Commission has not promulgated generic rate reasonableness standards. That argument is misdirected. As the court of appeals correctly noted (Pet. App. 30a-31a), in this case the ICC held that the state's decision failed to comply with the governing federal *statutory* standards, not with the Commission's prior rulings. While some courts have held that the term "federal standards" includes rulings by the ICC, *e.g.*, *Illinois Central Gulf R.R.* v. *ICC*, 702 F.2d 111, 115 (7th Cir. 1983), the Commission based its decision in this case on the Interstate Commerce Act, which itself defines standards that must be observed by state regulatory commissions. See *Utah Power & Light Co.* v. *ICC*, *supra*; *Wheeling-Pittsburgh Steel Corp.* v. *ICC*, 723 F.2d at 353-355.[11]

---

[11]Petitioner erroneously claims (Pet. 12) that the court of appeals' ruling here conflicts with the decision in *Kentucky Utilities Co.* v. *ICC*, 721 F.2d 537 (6th Cir. 1983). As the court of appeals explained (Pet. App. 31a), the two cases are clearly distinguishable. In *Kentucky Utilities*, the ICC reversed a state utilities commission because the state had used a ratemaking method which had previously been adopted by the

Petitioner also claims (Pet. 14-15) that the court of appeals' ruling requires a shipper to quantify the amount of revenue that a railroad loses because of inefficiency. That argument mischaracterizes the court of appeals' holding. The court merely agreed (Pet. App. 24a-25a) with the Commission (Pet. App. 53a, 67a) that an additional reason for invalidating the state's decision to limit the L&N's rates to the statutory minimum once any inefficiency had been shown is that that approach could lower the revenues of a revenue-inadequate railroad by an amount unrelated to the extent of the alleged inefficiency. Both the ICC and the court of appeals thus merely held that a state regulatory commission must find some relationship between the carrier's alleged inefficiency and the rate reduction.

Petitioner also argues (Pet. 15-16) that the ICC erred by failing to determine whether the "appropriate" rate for the L&N to charge once the Indiana PSC's ruling had been set aside was also a "reasonable" rate. The short answer to petitioner's argument is that, as the Commission noted (Pet. App. 68a), petitioner had the burden of proving that the L&N's existing rate was *un*reasonable and nothing in the Indiana PSC's decision supported that conclusion. Moreover, 49 U.S.C. 11501(c) simply directs the Commission to fix the "appropriate" rate for a carrier to charge once the Commission has found that a state commission has failed to comply with federal standards and procedures; nothing in the statute also requires the Commission to establish the maximum "reasonable" rate in these circumstances. The

---

ICC but was subsequently disapproved by the Commission. The Sixth Circuit held that the ICC could not reverse a state commission on the ground that it had violated interim guidelines promulgated by the ICC when the Commission had not adopted any general standard. 721 F.2d at 544-545. In this case, by contrast, the ICC found that the state PSC's decision was in violation of the statute itself, not the Commission's guidelines.

Commission explained why it ordered that L&N's existing rate be reinstated,[12] and the court of appeals upheld the Commission's decision on the ground that it was consistent with the Interstate Commerce Act, adequately reasoned, and supported by substantial evidence (Pet. App. 31a-34a). Petitioner does not claim that there is a conflict among the circuits on this question. Accordingly, petitioner's fact-bound claim does not warrant further review.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

ROBERT S. BURK
General Counsel

JOHN J. MCCARTHY, JR.
Deputy Associate General Counsel

EDWARD J. O'MEARA
Attorney
Interstate Commerce Commission

SEPTEMBER 1985

---

[12]The ICC gave several reasons for reinstating L&N's challenged rate as appropriate (Pet. App. 67a-68a, 80a-82a). For instance, after calculating variable costs, the ICC found that the resulting ratio of revenue to variable costs was comparable with other rates that the Commission had found were reasonable (Pet. App. 68a, 81a).

[13]Petitioner erroneously asserts (Pet. 17) that the court of appeals accorded undue deference to the ICC's expertise in this case. The court of appeals was entirely correct in following the settled principle that an agency's construction of a statute that it is entrusted to enforce is entitled to substantial deference, particularly where the agency is implementing a new statute (Pet. App. 21a-22a). See *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 4-7; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).